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IN THE

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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(5809)

Questions Presented.

There are two questions presented for review:

A. Did the Respondents violate the due process and equal protection rights of a Maryland-licensed attorney employed by the State of New York in refusing to recognize his New York legal experience (although not refusing to recognize his identical Maryland experience) for the purpose of qualifying the attorney for admission to the New York bar on motion, when similar service of New York State-employed attorneys has been accepted for this purpose?

B. Did the Respondents violate a Maryland-licensed attorney's Constitutional right to travel in refusing to recognize his New York State government legal experience for the purpose of qualifying the attorney for admission to the New York bar on motion?

Parties.

The parties to this cause are those whose names appear in the caption above.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW J. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Opinions Below.

After practicing public utility law for the Maryland state government for three years, the Petitioner was recruited to

perform identical service for the New York State government. After two years of service for New York, the Petitioner requested the Respondents to determine that his five years of legal practice qualified the Petitioner for admission on motion to the New York bar. By letter dated March 23, 1982, the Petitioner was notified that his request was denied because two of said five years of practice were performed for a New York State agency (appendix, p. A2). Petitioner then requested reconsideration of this denial. By letter dated April 20, 1982, the Petitioner was notified that his request for reconsideration had been summarily denied (appendix, p. A1).

Jurisdiction.

The determination of New York State's highest court on the merits of the Petitioner's qualification for admission to the New York bar on motion is a final judgment reviewable by writ of certiorari. *In re Summers*, 325 U. S. 561, 565-569 (1945). Jurisdiction to review said determination by writ of certiorari is conferred upon this Court by 28 U. S. C. §1257(c). A petition for writ of certiorari in such proceedings must be brought within ninety days of the April 20, 1982 denial of the request for reconsideration. *Gypsy Oil Co. v. Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393 (1927).

Constitutional Provisions, Statutes, and Court Rules Addressed.

The following provisions of the United States Constitution are involved in this case:

Article I, Section 8, Clause 3.

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .

Article IV, Section 2, Clause 1.

> Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Admission of attorneys on motion is governed by Sections (hereinafter referred to as Rules) 520.9 (a) and 520.12, Title 22, New York Code of Rules and Regulations, promulgated by the Respondents pursuant to Section 90(1)(b) of the New York *Judiciary Law*. The text of these provisions appears at appendix pages A7-A10.

Statement of the Case.

A. The Petitioner.

The Petitioner was a citizen and resident of the State of Maryland from birth until January, 1980, at which time he

became and since which time he has remained a citizen and resident of the State of New York. After graduating from the University of Maryland School of Law and passing the Maryland general bar examination, the Petitioner was admitted to the Maryland bar on December 30, 1976.

Upon his admission to the bar, the Petitioner was appointed an Assistant People's Counsel to the Maryland Public Service Commission. His duties as an Assistant People's Counsel were as follows: to appear on behalf of utility consumers before State and Federal utility regulatory commissions, to prosecute and defend judicial causes relating to utility matters, and to serve as legislative counsel to his agency. In September, 1979, he was recruited by the New York State government to serve as an Intervenor Attorney, with responsibilities identical to those of a Maryland Assistant People's Counsel (compare: *Annotated Code of Maryland, Public Service Commission Law,* Article 78, §15 [a] and [d], with New York *Executive Law* §553 [2] [c] and [3] [d] and [e], appendix pp. A11-A12).

The recruitment of out-of-state attorneys experienced in utility regulation is a common practice,* particularly in New York State. At the time of the Petitioner's recruitment by the Utility Intervention Unit of the State's Consumer Protection Board, half of the Unit's attorneys were admitted only in other jurisdictions. The State's Public Service Commission has similarly recruited a large number

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*While public utility law is a comparatively narrow area of specialization, its substance varies little from state to state and its practitioners often migrate to other states to pursue their calling. In order to increase his employment opportunities, the Petitioner, in 1977, secured bar admissions, upon examination, in the States of Florida and California and, upon motion, in the District of Columbia.

of out-of-state attorneys, particularly former employees of the Federal Power Commission (now the Federal Energy Regulatory Commission). The New York Attorney General also recruits out-of-state utility regulatory attorneys.

B. The State-of-Admission Practice Rule and the Arbitrary Pattern of its Application.

Pursuant to Respondents' Rule 520.9(a) (appendix, p. A8), an attorney having five years of legal practice may be admitted to the New York bar without examination. Such practice must occur in the attorney's state of admission (hereinafter referred to as the "State-of-Admission Practice Rule"), unless:

(a) performed in the employ of the Federal Government;

(b) performed as a law school professor; or

(c) the Respondents waive the State-of-Admission Practice Rule pursuant to Rule 520.12.

Upon information and belief, the first modern-era State-employed utility regulatory attorney who requested waiver of the State-of-Admission Practice Rule, as allowed by Rule 520.12 (then Rule 520.10), was Robert Reed, Esq. After practicing law for less than one year in his state of admission, Colorado, Mr. Reed became a hearing officer at the State Public Service Commission. In 1979, Mr. Reed petitioned the Respondents to determine that his service in and for the State of New York, when combined with his Colorado practice, be accepted as five years of law practice for the purpose of qualifying Mr. Reed for admission on motion. On July 12, 1979, the Respondents granted

Mr. Reed's petition for waiver (Reed waiver) (appendix, p. A5).

The Reed waiver was well known in the community of utility regulatory attorneys employed by the State of New York and the Petitioner learned of the Reed waiver when he was recruited by the State in the fall of 1979. The Petitioner's agreement to accept the New York position, effective January 14, 1980, relied upon the belief that the Respondents would regard the Petitioner's service in a similar manner.

In July, 1980, a second State-employed utility regulatory attorney, David A. Schlissel, Esq., requested waiver of the State-of-Admission Practice Rule so that his service as an Intervenor Attorney for the Consumer Protection Board, when combined with his 23 months of legal service in his state of admission, would be accepted for the purpose of qualifying for admission to the New York bar on motion. At the time of his request, however, Mr. Schlissel had already unsuccessfully taken the New York bar examination. The Respondents denied Mr. Schlissel's request (Schlissel denial). In a letter dated July 18, 1980, Mr. Schlissel was informed by the Respondents' Clerk that:

> [o]n the basis of your admission to practice in Georgia in 1973, your practice in Georgia for 23 months and your employment as a Utility Intervenor Attorney with the New York State Consumer Protection Board since December 1975, *you are qualified to file a petition for waiver* of strict compliance with the [State-of-Admission] practice requirement of 520.7(a) (2) [now Rule 520.9 (a) (2)]. However, I must advise you that it is the Court's

> opinion that the *practice of law in New York State for a state agency does not count as actual practice* for purposes of [qualifying for admission on motion]. (Emphasis supplied.) (Appendix, p. A4.)

Subsequently, a third State-employed utility regulatory attorney, William J. Cowan, Esq., requested waiver of the State-of-Admission Practice Rule so that his service for the State Public Service Commission, first as an opinion drafter and later as a hearing officer, when combined with less than one year of practice in Massachusetts, the state of his admission, would be accepted for the purpose of qualifying for admission to the New York bar on motion. Mr. Cowan's request was initially denied. In the denial letter, dated January 13, 1982, Mr. Cowan was informed that:

> Employment in New York State by the Public Service Commission, as an Administrative Law Judge and as Director of the Public Service Commission's Office of Opinions and Review is not actual practice in the contemplation of Rule 520.9 (a) (2) (i) (a). (Appendix, p. A3.)

Mr. Cowan then requested reconsideration of this determination, noting the Reed waiver. In late February, 1982, the respondents *reversed* their position and waived the State-of-Admission Practice Rule for Mr. Cowan (Cowan waiver).

On March 8, 1982, the Petitioner applied for waiver of the State-of-Admission Practice Rule so that his two years of service as an Intervenor Attorney, when combined with his three years of identical legal practice in Maryland, would be accepted for the purpose of qualifying the Petitioner for admission on motion. By a letter dated March 23, 1982, the Petitioner was informed that:

> Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in contemplation of Rule 520.9 (a) (2) (i) (a). (Appendix, p. A2.)

The Petitioner thereupon requested reconsideration, noting that the Reed and Cowan waivers were granted to recognize service qualitatively equivalent to that of the Petitioner.*

C. Constitutional law questions raised below.

The Petitioner's request for reconsideration argued that the Respondents' action abridged the Petitioner's rights to equal protection and due process as well as his privileges and immunities as guaranteed by Article IV, §2, of the Federal Constitution.

The Petitioner explained that he moved from Maryland to New York for the specific purpose of practicing law and contrasted the Respondents' instant denial with their determination in *Gordon v. Committee on Character and Fitness* (1979), 48 N. Y. 2d 266, 422 N. Y. S. 2d 641, that barriers to the interstate migration of attorneys (there a

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*Indeed, the Petitioner's legal experience arguably exceeded that of Messrs. Reed and Cowan inasmuch as an Intervenor Attorney must be an attorney and must participate in judicial proceedings as well as administrative ones. For example, as an Intervenor Attorney, the Petitioner has been admitted *pro hac vice* to appear before several New York courts, including the New York Court of Appeals, and has also appeared before the United States Court of Appeals for the District of Columbia Circuit. Administrative law judges and opinion drafters, on the other hand, do not appear in judicial proceedings. Moreover, while both Messrs. Reed and Cowan were credited for acquiring legal experience as administrative law judges, there is no requirement that such personnel be attorneys. Two current administrative law judges are trained only in the field of engineering.

residency requirement) violated the privileges and immunities clause of Article IV of the Federal Constitution.

In his letter transmitting the petition for reconsideration, the Petitioner also requested an opportunity to appear before the Respondents, either formally or informally, to explain the grounds upon which he believed his New York legal experience should be recognized for the purpose of qualifying him for admission to the New York bar on motion. By letter dated April 20, 1982, however, the Petitioner was notified, without explanation, that his petition for reconsideration had been summarily denied.

ARGUMENT.

A. Did the Respondents violate the due process and equal protection rights of a Maryland-licensed attorney employed by the State of New York in refusing to recognize his New York legal experience (although not refusing to recognize his identical Maryland experience) for the purpose of qualifying the attorney for admission to the New York bar on motion, when similar service of New York State-employed attorneys has been accepted for this purpose?

In *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238-239, 77 S. Ct. 752, 1 L. Ed. 2d 796, 801-802 (1957), this Court established the following constitutional standards governing State bar admission practices:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Or Equal Protection Clause of the Fourteenth Amendment. [Citations omitted] A State can require high

> standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064.

In the companion case of *Konigsberg v. State Bar of California,* 353 U. S. 252, 273, 77 S. Ct. 722, 1 L. Ed. 2d 810, 825, the Court added that while it is important to

> [leave] States free to select their own bars, . . . it is equally important that the State not exercise this power in an arbitrary or discriminatory manner . . .

Due process.

The Petitioner's five years of legal employment qualified the Petitioner for a determination that his legal experience was sufficient for admission to the New York bar without examination (see; Schlissel denial, appendix, p. A4). Being thus eligible under State law, cf. *In re Lockwood,* 154 U. S. 116 (1894), for a determination of qualification, the Petitioner was entitled to procedural due process, including the right to notice, hearing, and the right to present evidence. *Goldsmith v. United States Board of Tax Appeals,* 270 U. S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494 (1926). The Respondents, however, afforded the Petitioner neither a hearing nor an opinion

stating its grounds for invoking the State-of-Admission Practice Rule in this instance.

While the Respondents held that employment as an Intervenor Attorney is not actual practice of law for the purpose of qualifying for admission to the New York bar on motion, the Respondents do not deny that the Petitioner's service is the practice of law. The Respondents' policy is simply that "the practice of law . . . for a state agency does not count . . ."* (appendix, p. A4).

The Respondents' refusal to recognize the Petitioner's New York practice was not based upon a qualitative consideration of the Petitioner's legal experience but rather

*The Petitioner appears most frequently before the New York Public Service Commission. The State's Bar Association issued an advisory opinion in 1977 finding that a layman's representation of a party to a Public Service Commission proceeding constituted the (unauthorized) practice of law. New York State Bar Association Unlawful Practice of Law Committee (Committee), Advisory Opinion #39, issued April 19, 1977. In that opinion, the Committee based its conclusion upon the observation that Commission practice involved the

> preparation of pleadings, examination and cross-examination of witnesses and preparation of legal briefs and arguments (*id.*, p. 1).

The Committee, at length, adopted the following conclusion of the South Carolina Supreme Court as its own:

> Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. *It is the character of the act, and not the place where it is performed, which is the decisive factor.* [Emphasis in Bar Association's Opinion.] *State v. Wells*, 191 S. C. 468, 5 S. E. 2d 181, 185 (1939) (*id.*, p. 4).

upon his failure to practice in the "right" place. Seemingly, if he were employed by the State Public Service Commission rather than appearing before it, or if he had remained in Maryland practicing before that State's Public Service Commission for an additional two years, the Respondents would have recognized his practice for the purpose of his gaining admission on motion to the New York bar. Such distinctions are arbitrary and irrational and thus violative of both the due process and equal protection clauses. *Goldsmith, supra; Schware, supra; Konigsberg, supra.*

The right to practice law in a state is not a "matter of grace and favor" or "a mere indulgence," *In re Garland,* 71 U. S. 366, 370 (1867), but rather a necessary condition for the pursuit of a lawyer's livelihood. The Petitioner's request to qualify for admission on motion involved a fundamental property interest and should have been accorded the procedural safeguards of the Due Process Clause.

The State-of-Admission Practice Rule, here cited to discredit the Petitioner's New York service, is not related to an applicant's fitness of character, *see: Shaikh v. Appellate Division,* 39 N. Y. 2d 676, 350 N. E. 2d 902, 385 N. Y. S. 2d 514, 517 (1976), but only an applicant's legal knowledge.* The rule, however, is not rationally-related to that objective. Five years of legal service by an attorney in his state of admission is not likely to render that attorney proficient in laws peculiar to the State of New York. Indeed, since New York experience is rejected while out-of-state practice is not, the bar examination is waived for those applicants least familiar with the topics of New York law covered in the examination.

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*The Respondents there held: "[E]ducational and legal qualification, . . . is a requirement separate and distinct from 'character and fitness.' " *Id.,* 385 N. Y. S. 2d at 517.

The arbitrary application of the State-of-Admission Practice Rule to discredit the Petitioner's New York practice precludes the Petitioner from qualifying for admission to the New York bar so long as he maintains his present position, since the Respondents have created an irrebutable presumption that the practice of law by an Intervenor Attorney is not the "actual practice in contemplation of Rule 520.9(a) (2) 1(a)" (appendix, p. A2).

The Petitioner has been denied the opportunity to qualify for admission to the New York bar on motion in a wholly arbitrary manner and upon considerations which offend the dictates of reason. The Respondents' action, therefore, violated the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment. *Schware, supra,* 353 U. S. 232, 249, 251 (concurring opinion).

Equal protection.

The object of the equal protection clause is to guarantee that persons similarly situated shall be treated equally. *Yick Wo v. Hopkins, supra.* Nonetheless, distinctions among individuals are permitted under the Constitution if a state can show that the distinctions are rationally-related to furthering legitimate State interests. If fundamental rights are impaired by a classification, however, the state bears a heavy burden of justification.

The Respondents here have distinguished the practice of utility regulatory law while employed by the State Public Service Commission from the practice of utility regulatory law while employed by the State Consumer Protection Board for the purpose of granting admission to the New York bar without examination. Even under the "minimal rationality test," such a distinction among members of the

class of New York State-employed utility regulatory attorneys cannot stand.

The Respondents' action, however, should be subjected to strict scrutiny since the Petitioner, like Messrs. Reed and Cowan, has exercised his right to interstate travel to pursue his professional calling, a right protected by the Commerce Clause and the privileges and immunities clauses of Article IV and Amendment XIV of the Federal Constitution. See discussion, *infra*.

When a State's discrimination affects a fundamental right, the constitutionality of the discrimination is ascertained by the application of a two-part test. First, there must be a showing that the disfavored individual constituted "a peculiar source of evil" at which the action is aimed. *Toomer v. Witsell*, 324 U. S. 385, 398, 68 S. Ct. 1156, 1163, 92 L. Ed. 1460 (1948). Second, there must be a "reasonable relationship between the danger . . . and the . . . discrimination practiced . . . ." *Id.* 324 U. S., at 399.

The Petitioner's migration to the State of New York at the request (and expense) of the State of New York to work for the State of New York constituted no peculiar evil to the people or the State of New York; quite the contrary, the State's interest was enhanced by successfully attracting the Petitioner and other qualified practitioners from beyond its borders to join its civil service.

Assuming, *arguendo*, however, that the Petitioner's migration to New York posed a threat to the populace of the State, the most reasonable means of remedying the threat would have been for the State not to have recruited the Petitioner in the first place.

Furthermore, no vital State interest can possibly be served by admitting Messrs. Reed and Cowan on motion but subjecting the Petitioner to the expense, anxiety, and loss of employment occasioned by the rigors of preparing for a full bar examination. For these reasons, the Court should hold that the Respondent's discriminatory refusal to recognize the Petitioner's New York legal experience violated his right to the equal protection of the laws.

B. Did the Respondents violate a Maryland-licensed attorney's Constitutional right to travel in refusing to recognize his New York State government legal experience for the purpose of qualifying the attorney for admission to the New York bar on motion?

The Respondents' refusal to recognize the Petitioner's two years of New York legal experience penalizes the Petitioner for accepting New York State government employment at a time when he had only completed three years of practice in his native State. For this transgression, no matter how many years further the Petitioner remains an Intervenor Attorney, he will be disqualified from entering private practice in his adoptive State unless he successfuly takes a full bar examination or physically removes to and practices in a state of admission for an additional two years.

The right of a citizen of one state to travel to another state for the purpose of pursuing his professional calling on an equal footing with that state's own citizens is fundamental. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CC E. D. Pa. 1823). This right has been held at times to derive from the privileges and immunities clause of Article IV, the Commerce Clause, and the privileges and immunities clause of the XIVth Amendment, *see:*

Zobel v. Williams, ____ U. S. ____, ____, 50 L. W. 4613, 4616-4617 (1982) (Brennan, J., concurring) and ____ U. S. ____, ____, 50 L. W. 4618-4620 (O'Connor, J., concurring). This right was also embodied in the fourth article of the Articles of Confederation. *See: Baldwin v. Fish and Game Commission of Montana*, 436 U. S. 371, 379-80, 98 S. Ct. 1852, 1858, 56 L. Ed. 2d 354 (1978).

While the right to travel is fundamental, it is not absolute. *Toomer v. Witsell, supra*, 334 U. S., at 396. A discrimination against citizens from other states will pass constitutional muster if it satisfies the two-pronged test discussed previously.

First, the discrimination must have a rational relationship to the peculiar evil occasioned by the presence of the disfavored non-citizen. If so, the discrimination actually practiced must be shown to be closely tailored to achieve its objective. *Hicklin v. Orbeck*, 437 U. S. 518, 528, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).

In the instant case, it is unclear what evil Petitioner's service to the State of New York constituted to warrant rejection of that legal service for demonstrating legal knowledge. His New York practice, *per se*, presents no threat to the general public of New York, since the Petitioner's sole client is the State itself; and his New York legal experience, if anything, renders the Petitioner more familiar with New York law than attorneys admitted on motion who have had no contact with the State.

The Respondents' stated policy not to waive their State-of-Admission Practice Rule for a utility regulatory attorney or other attorneys practicing law for the State does not promote the State's interest and, as such, constitutes an unwarranted barrier to interstate travel.

Reasons for Granting Writ.

The objective of bar admission standards and penal laws prohibiting the unauthorized practice of law is to protect the public rather than the economic interest of the local bar. Cf. *State v. Wells,* 191 S. C. 468, 5 S. E. 2d 181, 186 (1939); *People v. Black,* 156 Misc. 516, 282 N. Y. S. 197, 200 (1935). Barriers to the admission of out-of-state attorneys, however, frequently promote no more than economic protectionism. *See:* Note, "A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 *Harvard Law Review,* 1461, 1472-1473 (1979). As former American Bar Association President Chesterfield Smith recently wrote:

> Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition. They have not undertaken to determine whether the out-of-state lawyer is better or worse than the resident lawyer or whether the standard for bar admission in the other state is higher or lower than their own.—"Time for a National Practice of Law Act," 64 *ABA Jour.* 557.

While the State-of-Admission Practice Rule, on its face, actually seems to favor certain non-residents (those having practiced in their states of admission) over residents, the practical effect is to discourage out-of-state attorneys from accepting New York-based employment opportunities until the completion of five years of service in their states of admission. In this effect, New York attorneys are given a competitive advantage for positions in both State government and in the private sector. The rule also has the

secondary effect of inhibiting recent out-of-state bar admittees from migrating to *any* other state to pursue interim employment opportunities (such as corporate transfers) if their career objective is practice law in New York.

New York's State-of-Admission Rule is not unique. Upon information and belief, counterpart regulations exist in the States of Illinois, Tennessee, Hawaii and New Mexico and may exist in other states.*

Such barriers, erected ostensibly in the public interest, needlessly discourage the interstate migration of duly-educated and licensed attorneys, particularly at a time of increasing uniformity of both state laws and state bar examinations.

Prayer for Relief.

WHEREFORE, the Petitioner prays that this Court:

1. Order a writ of certiorari to issue to the Court of Appeals of the State of New York to review the determination of the Respondents, communicated by a letter dated March 23, 1982, and the Respondents' refusal to reconsider said determination, communicated to the Petitioner by a letter dated April 20, 1982;

2. Reverse the determinations aforesaid and command the Respondents to enter an order that the Petitioner has sufficient legal experience to be admitted to the New York bar without examination;

---

*United States Law Week has reported that Federal district courts in Maryland and Michigan have declared unconstitutional state-of-admission practice requirements used to deny expedited bar admission to resident attorneys whose practice was not in their states of admission. 49 L.W. 2338 (1980) and 50 L.W. 2547 (1982). The opinions in those cases, however, were withdrawn, upon information and belief, when these restrictions were abolished.

3. Grant the Petitioner costs, and such other and further relief as the Court may deem just and proper.

Dated: Albany, New York
July 13, 1982

Respectfully submitted,

PHILIP S. SHAPIRO
Petitioner, *Pro Se*
47 Peyster Street
Albany, NY 12208
(518) 482-4313

A 1

Letter, Dated April 20, 1982, Denying the Petitioner's Request for Reconsideration.

COURT OF APPEALS

STATE OF NEW YORK

April 20, 1982

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application of Philip S. Shapiro for a determination of five years actual practice (22 NYCRR 520.9[a] [2] [i] [d]).

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition for reconsideration in the above captioned proceeding verified April 7, 1982, has been denied.

Very truly yours,

DONALD M. SHERAW
Deputy Clerk

AO'B:tab

Letter, Dated March 23, 1982, Denying the Petitioner's Request for a Determination That His Legal Experience Qualified Him for Admission on Motion.

COURT OF APPEALS

STATE OF NEW YORK

March 23, 1982

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application
of Philip S. Shapiro for waiver
of strict compliance with the
practice requirements of
22 NYCRR 520.9(a) (2).

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding has been denied.

While the Court does not issue opinions or reasons in these matters, it is pertinent to note that in the Court's review and determination, it has concluded that your petition does not establish the required substantial compliance with Rule 520.9(a) (2), so as to qualify you for a waiver pursuant to Rule 520.12. In particular, your petition did not establish five years practice of law. Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in the contemplation of Rule 520.9(a) (2) (i) (a).

Very truly yours,

AO'B:tab JOSEPH W. BELLACOSA

Letter, Dated January 13, 1982, Denying Request by William J. Cowan, Esq., for a Determination That His Legal Experience Qualified Him for Admission on Motion (Cowan Denial). [Subsequently Reversed]

COURT OF APPEALS

STATE OF NEW YORK

January 13, 1982

William J. Cowan
28 Pheasant Ridge Drive
Loudonville, New York 12211

In the Matter of the Application
of William J. Cowan for waiver of
strict compliance with the practice
requirements of 22 NYCRR 520.9(a) (2).

Dear Mr. Cowan:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding has been denied.

While the Court does not issue opinions or reasons in these matters, it is pertinent to note that in the Court's review and determination, it has concluded that your petition does not establish the required substantial compliance with Rule 520.9(a) (2), so as to qualify you for a waiver pursuant to Rule 520.12. In particular, your petition did not establish five years practice of law. Employment in New York State by the Public Service Commission, as an Administrative Law Judge and as Director of the Public Service Commission's Office of Opinions and Review is not actual practice in the contemplation of Rule 520.9 (a) (2) (i) (a).

Very truly yours,

AO'B:tab JOSEPH W. BELLACOSA

Letter, Dated July 18, 1980, Denying Request by David A. Schlissel, Esq., for a Determination That His Legal Experience Qualified Him for Admission on Motion (Schlissel Denial).

COURT OF APPEALS

STATE OF NEW YORK

July 18, 1980

Mr. David A. Schlissel
119 South Lake Avenue
Albany, New York 12208

Dear Mr. Schlissel:

I acknowledge receipt of your letter of inquiry regarding admission on motion in New York State. On the basis of your admission to practice in Georgia in 1973, your practice in Georgia for 23 months and your employment as a Utility Intervenor Attorney with the New York State Consumer Protection Board since December 1975, you are qualified to file a petition for waiver of strict compliance with the practice requirement of 520.7(a) (2). However, I must advise you that it is the Court's opinion that the practice of law in New York State for a state agency does not count as actual practice for purposes of 520.7(a) (2) when the attorney is not admitted in New York unless such practice is authorized by special statute.

Very truly yours,

AO'B:tab JOSEPH W. BELLACOSA

Order, Dated July 12, 1979, Determining That the Legal Experience of Robert D. Reed, Esq., Qualified Him for Admission on Motion (Reed Waiver).

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 12th day of July, A. D. 1979.

Present,

Hon. Lawrence H. Cooke, Chief Judge, presiding.

IN THE MATTER

OF

The Application of ROBERT D. REED, for Admission to the Bar.

On reading and filing the petition of Robert D. Reed, verified June 26, 1979, and the papers submitted therewith, and on motion, it is

ORDERED, that on satisfying the requirements of the Appellate Division of the Supreme Court in other respects and upon proof of admission to practice as an attorney in the State of Colorado on April 26, 1972, and proof of

practice in Colorado from May, 1972 to December, 1972 and proof of employment as an Administrative Law Judge, *sub nomine* Hearing Examiner, for the New York State Public Service Commission from September 2, 1973 to date, which combined practice totals more than five years and which is deemed to be in substantial compliance with section 520.8(a) (2) of the Rules of this Court, the said Robert D. Reed may apply for admission to practice as an attorney and counselor at law with the same force and effect as if he had actually practice for five years in the state where admitted.

HUGH R. JONES
Associate Judge
Court of Appeals

DONALD M. SHERAW
Deputy Clerk of the Court

New York Judiciary Law §90(1) (b).

§90. Admission to and removal from practice by appellate division; character committees.

1. b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

New York Code of Rules and Regulations, Title 22, §§ 520.9(a) and 520.12.

520.9 Admission without examination. (a) *General.* In its discretion the Appellate Division may admit to practice without examination an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney-and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and

(2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:

(a) in its highest law court of highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or

(b) In Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(c) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(d) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph; or

(ii) is a graduate of and has received a first degree in law from an approved law school as defined in section 520.3(b) of this Part and, for a period of at least five years immediately preceding the application for admission without examination, has been employed in this State or in any other state or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor or associate professor; and

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age.

* * *

520.12 Application for waiver of rules. The Court of Appeals, upon application, may in its discretion vary the

application of or waive any provision of these rules where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

Annotated Code of Maryland, Public Service Commission Law, Article 78, §15(a) and (d).

§15. Powers and duties.

(a) *Generally.*—The office of people's counsel shall evaluate all matters pending before the Commission to determine if the interests of residential users of gas, electricity, telephones, or water and sewerage or of noncommercial users of other regulated services (hereinafter referred to as residential and noncommercial users) are affected. It shall appear before the Commission and the courts on behalf of those users in all matters or proceedings over which the Commission has original jurisdiction and in which the office of people's counsel deems their interest to be involved including, but not limited to, proceedings with regard to the rates, service, or practices of any public service company or any violation of the provisions of this article. It shall have, in such appearances, all the rights of counsel for a party to the proceeding, including but not limited to those specified in §82. The people's counsel may appear before any federal or State agency as necessary to protect the interests of residential and noncommercial users.

* * *

(d) *Recommending legislation.*—The office of people's counsel may recommend to the General Assembly legislation on any matter within or related to the Commission's jurisdiction which in its judgment would affect the interests of noncommercial or residential users. (1955, ch. 441; 1974, ch. 99; 1975, ch. 315; 1976, ch. 756, §§ 1, 3.)

New York Executive Law §553 (2)(c) and (3)(d) and (e).

§553. Powers and duties of the [state consumer protection] board and the executive director

* * *

2. The executive director shall have the power and duty to:

* * *

c. on behalf of the board, initiate, intervene in, or participate in any proceedings before the public service commission, to the extent authorized by sections twenty-four-a, seventy-one, eighty-four or ninety-six of the public service law or any other applicable provision of law, where he deems such initiation, intervention or participation to be necessary or appropriate.

3. The executive director when so directed by the board shall have the power and duty to:

* * *

d. represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies;

e. study the operation of consumer protection laws and recommend to the governor new laws and amendments of laws for consumer protection;

Office - Supreme Court, U.S.
FILED
NOV 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-76

In the

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW L. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari and Appendix

ROBERT ABRAMS
Attorney General of the State of New York, Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 474-7173

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
JEREMIAH JOCHNOWITZ
Assistant Solicitor General
BETSY BRODER
Deputy Assistant Attorney General
Of Counsel
Dated: July 26, 1982

Questions Involved.

1. Whether an administrative determination as opposed to a judicial determination, by the New York Court of Appeals, which could have been reviewed in New York State Courts by an Article 78 proceeding or in action seeking a declaratory judgment, is reviewable by the Supreme Court?

2. Whether the Court of Appeals would be estopped from denying petitioner's application for admission to New York State bar because it had allegedly granted similar applications by others and the petitioner relied on them?

3. Whether the petitioner may extend the 90-day period in which he has to apply for a writ of certiorari by requesting reconsideration of a determination by the Court of Appeals where there is no provision for such reconsideration?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

No. 82-76

PHILIP S. SHAPIRO,

Petitioner,

against

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

Brief in Opposition to Petition For a Writ of Certiorari.

Statement.

The respondent submits this brief in opposition to Philip S. Shapiro's petition for a writ of certiorari to review an administrative determination of the New York State Court of Appeals denying petitioner's application

for a waiver of compliance with the practice requirements under 22 NYCRR 520.9(a)(2) on the grounds that employment in New York State by the Consumer Protection Board as an intervenor attorney is not actual practice in the contemplation of Rule 5909(a)(1)(a).

Facts.

Petitioner was a cititzen of Maryland and was admitted to practice before the Maryland bar on December 30, 1976. He practiced in Maryland until January 1980 when he moved to New York State and entered the employ of the Utility Intervention Unit of the State's Consumer Protection Board, a New York Agency. In 1982, petitioner applied for admission to the New York State bar based on the three years' practice in Maryland and two years in which he worked in New York for the Utility Intervention Unit of the State's Consumer Protection Board.

Petitioner was advised of the Court of Appeals' denial of his application by letter written by Joseph W. Bellacosa, Clerk of the Court, dated March 23, 1982. This letter reads as follows (Pet Appendix, A2):

"COURT OF APPEALS
STATE OF NEW YORK

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application of Philip S. Shapiro for waiver of strict compliance with the practice requirements of 22 NYCRR 520.9(a) (2).

March 23, 1982

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding has been denied.

While the Court does not issue opinions or reasons in these matters, it is pertinent to note that in the Court's review and determination, it has concluded that your petition does not establish the required substantial compliance with Rule 520.9(a) (2), so as to qualify you for a waiver pursuant to Rule 520.12. In particular, your petition did not establish five years practice of law. Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in the contemplation of Rule 520.9(a) (2) (i) (a).*

Very truly yours,

AO'B:tab JOSEPH W. BELLACOSA"

*Both Rule 520.9 and Rule 520.12 are set forth in the Petition for a Writ of Certiorari at pages A8 to A10.

Petitioner, on April 7, 1982, asked for reconsideration. Reconsideration was denied by the Court of Appeals and petitioner was informed by letter of Donald M. Sheraw, dated April 10, 1982 (Pet Appendix, A1):

"COURT OF APPEALS

STATE OF NEW YORK

April 20, 1982

Philip S. Shapiro
47 Peyster Street
Albany, New York 12208

In the Matter of the Application of Philip S. Shapiro for a determination of five years actual practice (22 NYCRR 520.9[a] [2] [i] [d]).

Dear Mr. Shapiro:

I am directed by the Court of Appeals to advise you that your petition for reconsideration in the above captioned proceeding verified April 7, 1982, has been denied.

Very truly yours,

DONALD M. SHERAW
Deputy Clerk"

The petition states that three persons had applied and were admitted to New York State law practice where the

Court accepted a combination of practice in the original State of admission and employment by a New York State agency for the balance of the time necessary. These persons were Robert Reed, David A. Schlissel and William J. Cowan.

Petitioner commenced no proceedings in New York State courts to contest the administrative determination of the Court of Appeals denying him admission to practice. However, petitioner commenced an action in the United States District Court for the Northern District of New York in which Chief Judge Lawrence H. Cooke and Associate Judges Matthew J. Jasen, Domenick L. Gabrielli, Hugh R. Jones, Sol Wachtler, Jacob D. Fuchsberg and Bernard S. Meyer as the Court of Appeals of the State of New York were the defendants. The complaint is dated May 21, 1982 and the relief demanded is as follows:

"RELIEF DEMANDED

"20. Plaintiff prays for judgment

"a. declaring unconstitutional Rule 520.9(a) of the New York Court of Appeals in so far as it precludes legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under its five-year service requirement, and

"b. enjoining defendants from precluding legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under the five-year rule, and

"c. for attorneys' fees, costs and disbursements."

A copy of the complaint is attached to the Appendix of this brief. The State answered the complaint by instrument dated June 14, 1982. A copy of the answer is attached to the Appendix to this brief. Both parties have moved for summary judgment in that action. The motions have not as yet been decided.

Federal Statutes and State Statutes Involved.

28 USC 1257:

"§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

New York Civil Practice Law and Rules:

Section 1026:

"§ 1026. Review of determinations by administrative officers of the unified court system

In any action or proceeding brought to review a determination of the chief judge of the court of appeals, of the court of appeals or of the administrative board of the courts, made pursuant to the provisions of article seven-A of the judiciary law or section twenty-eight of article six of the constitution, the only proper party to be named therein shall be the chief administrator of the courts, in his representative capacity. No action or proceeding so instituted shall name the chief judge, the court of appeals or any member thereof, or the administrative board or any member thereof as a party."

"§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever

in any statue reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court."

Section 7802(a):

"§ 7802. Parties

(a) Definition of 'body or officer'. The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article"

Section 7803:

"§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

New York Judiciary Law, § 90 (10):

"10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be

divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

ARGUMENT.

I.

Since the Court of Appeals in denying petitioner's application for admission was acting not in a judicial capacity but in an administrative capacity, this application is premature.

Petitioner seeks certiorari in this case to review an administrative determination made by the Court of Appeals, and not from a Court of Appeals judicial decision. The Court of Appeals is not only New York State's highest tribunal (NYS Const, Art VI, §§ 2 and 3), but also performs administrative functions delegated to it by the Legislature. The fact that the Court of Appeals performs administrative functions, in addition to acting as a court, is well established. New York State Constitution, Article

VI, § 28 and Judiciary Law, Article 7-A give the Chief Judge and the Court a substantial role in administration of the State's court system. Civil Practice Law and Rules, § 1026, demonstrates that this administrative role may give rise to litigation in inferior courts, for it provides that the party to be named in such case is the chief administrator of the courts, rather than the Court of Appeals or any of its Judges.

Petitioner seeks certiorari here from another type of administrative determination of the Court of Appeals; that dealing with admission to the Bar. Involved here is New York Code of Rules and Regulations, Title 22, § 520.9(a), which provides for admission in certain cases without examination of the applicant. Such admission is within the discretion of the Appellate Division, when the applicant has practiced for five years in the highest court of original jurisdiction in a State or territory of the United States or the District of Columbia, or in a common law country *where admitted*. Paragraphs "b" and "c" provide for admission after five years of practice under other circumstances not involved here. Paragraph "d" provides that the Court of Appeals may admit a person to practice when it has determined that five years of combined or cumulative service in authorized categories is the equivalent of the practice required under paragraph "a." Section 22-520.12 provides that the Court of Appeals may in its discretion waive any provisions where strict compliance will cause undue hardship.

In the instant case, petitioner's application to the Court of Appeals is based upon three years practice in the State of Maryland and two years service in the State of New York, while working for the Utility Intervention Unit of the State's Consumer Protection Board. It should be

noted that during those two years of service, petitioner was not admitted to practice in New York State nor practicing in Maryland, the State in which he was admitted. The Court of Appeals, in determining that petitioner's service was not the equivalent to practice, issued no order or decision or judgment, but merely informed petitioner by letter from the Clerk of the Court (A2, Pet App).

In a court proceeding, there is a record which can be reviewed. In the instant case, because there was no court proceeding, there is no reviewable record.

To overcome this defect, petitioner sets forth an appendix which consists of copies of a number of letters (some in matters involving other candidates) and an order of the Court made in an application by one Robert D. Reed for admission to the New York State Board. Nowhere in this appendix does it show that the petitioner pursued the judicial remedies available to him in New York law.

Accordingly, the petition for a writ of certiorari should be dismissed because there has been no final judgment or decree rendered by the highest court of this State in which a decision could be made. 28 USC 1257 provides for appeal or certiorari to the United States Supreme Court from *final judgments or decrees rendered by the highest court of the State* in which a decision could be had. Since there was no judicial determination by the Court of Appeals here, neither appeal nor certiorari lie. To the contrary, the Court's administrative determination not to waive its rule was judicially reviewable in New York State court proceedings so that the action, in any event, was not a final judgment rendered by the highest court in which a decision could be had.

In an affidavit by Hugh R. Jones, Associate Judge of the Court of Appeals,* Judge Jones states that New York has a compelling interest in assuring that attorneys who appear before its Bench meet the minimum standards of competence and that this is done generally by the applicant passing the Bar examination. He notes that there is an exception which provides for admission where the applicant has actually practiced law for a period of five years. The Appellate Division is vested with the general responsibility of determining this five-year practice requirement, but where the five-year requirement is accomplished by combining or accumulating services, the Court of Appeals, acting in an administrative and not a judicial capacity, makes the determination.

Petitioner was not without a remedy in New York State. A determination by an administrative body is reviewable by New York State Courts pursuant to New York State CPLR, Art. 78. CPLR § 7802(a) includes a court as one of the bodies whose administrative determination may be reviewed. Before seeking relief from this Court, petitioner should have pursued the available New York State remedies in the form of an Article 78 proceeding. If he had done so, there would have been an adequate record for this Court to have reviewed.

A similar question was considered by this Court in *Fleming v. New York Court of Appeals,* 450 US 902 (1981), which was a case in which the applicant also sought review of the Court of Appeals administrative denial of his admission to the New York State Bar. There, this court

*This affidavit was furnished by Judge Jones in a pending proceeding commenced by the petitioner here in the United States District Court for the Northern District of New York in which he has challenged the Court of Appeals' denial of his admission to the State Bar. A copy of this affidavit is set forth in the appendix to this brief.

treated Fleming's appeal as a petition for certiorari and denied the writ.

In *Morganthau v. Cooke, Chief Judge of the Unified Court System of the State of New York, et al.*, 56 NY2d 24 (1982), the acts of Chief Judge Cooke, as administrator of the New York Court System, were challenged by way of an action for declaratory judgment. The Court of Appeals declared that certain acts undertaken by the Chief Judge exceeded the powers granted him, and found in favor of Morganthau. Thus, the petitioner could have challenged the acts of the Court of Appeals by Article 78 and also by declaratory judgment. If either of these methods had been pursued and the highest court of New York State had made its determination, relief would have been available, which could have been presented to this Court by Petition for Writ of Certiorari.

There have been other cases in which judicial review of the rules governing admission in New York State were considered. In fact, the rule requiring residency of the applicant was struck down in *Gordon v. Committee on Character and Fitness*, 48 NY2d 266 (1980) and in *Matter of Pirie*, 64 AD2d 110 (1st Dept, 1978), where the applicants pursued the legal remedy rather than seeking to avoid it as petitioner has done here. In each of the aforementioned cases, the appellants, instead of seeking to bypass the State's admission proceedings, went forward with their application for admission and pursued their remedy in the New York State courts. Had there been an adverse ruling to them in the State's highest court, they could have sought remedy in the United States Supreme Court.

II.

The alleged instances where admission was granted to other persons under similar circumstances do not estop the Court of Appeals from denying petitioner's application.

Petitioner states that on prior occasions other attorneys with similar practice background were admitted by the Court of Appeals. Even if the cases were identical and if the denial of petitioner's application were considered an order of the Court of Appeals, the Court would not be forced to follow the prior holdings. At most it would be a precedent which the Court could follow or ignore. If a court were obliged to follow precedent, there could be no change or progress in the law. Courts, including this Court, have often refused to follow their earlier decisions. There certainly cannot be an estoppel of the Court because it had previously made a contrary decision in another matter with other parties where the previous matter did not pose a bar of *res judicata* or collateral estoppel.

If the matter is not considered a court decision but an administrative determination by the Court of Appeals, the Court of Appeals could act similarly. Petitioner here would apply the rule of estoppel against the Court of Appeals. A party can only claim estoppel based on a statement made to him by the one being estopped. 31 CJS *Estoppel*, § 69, page 416 considered this, saying:

> "Estoppel cannot be based on statements to third parties which were not intended to be communicated to the party claiming the benefit thereof."

The decisions which petitioner would base his estoppel on were never communicated to him by the Court of Appeals.

As a matter of fact, New York State Judiciary Law, § 90(10) provides in part that:

> "10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential."

Thus, petitioner would have the Court estopped by matters which it could not have communicated to him because they were confidential.

The Court of Appeals is a public agency. Under New York law, it is well established that estoppel is not available against a public agency (*Public Improvements, Inc. v. Board of Education of the City of New York*, 56 NY2d ____ [decided June 8, 1982], see, also, *Matter of Hamptons Hosp. & Med. Center v. Moore*, 52 NY2d 88 [1981]; *Matter of Bloomberg-Dubin v. Board of Educ. of City of New York, et al.*, 82 AD2d 854, affd 56 NY2d 555 [1982]). The federal rule is fundamentally the same (see *Schweiker v. Hansen*, 450 US 785, 789-790 [1981] and *United States Immigration and Naturalization Services v. Hibi*, 414 US 5, 8 [1973]). Thus, whether the past determinations set up by petitioner in his appendix are administrative decisions or judicial determinations, they do not bind the Court of Appeals as to future acts and they do not create any right in the petitioner.

III.

The application for certiorari is late.

Mr. Shapiro's petition for admission was denied by the Court of Appeals by letter dated March 23, 1982 (Applt App, A2). If the action challenged were a judicial determination, then this letter would have been the decision. The petitioner would have then had 90 days in which to apply for certiorari. His 90 days would have expired on June 21, 1982. His petition for certiorari is dated July 13, 1982.

Petitioner, however, requested reconsideration of the denial of his application. He was advised by the Clerk of the Court of Appeals on April 20, 1982 that reconsideration had been denied (Applt App, A1).

There is no provision or principle in New York law which would entitle petitioner to ask for reconsideration of the original determination by the Court of Appeals. Since there is no right to apply for reconsideration of an application for admission, such as petitioner made, the making of such an application would not extend petitioner's time to act. If certiorari had been available to petitioner, the application for reconsideration would not extend his time to apply for it (*FTC v. Minneapolis-Honeywell Regulator Co.*, 344 US 206, 210-12 [1952]; *King, Governor of Massachusetts, et al. v. Preterm, Inc., et al.*, 449 US 901 [1980]). It should be noted that the effect of applying this time limitation is procedural only and does not deprive petitioner of pressing his claim should he be so advised. In fact, he has sought to do this by commencing an action in the United States District Court for the Northern District.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated: Albany, New York
July 26, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Respondents

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JEREMIAH JOCHNOWITZ
Assistant Solicitor General

BETSY BRODER
Deputy Assistant Attorney General
Of Counsel

APPENDIX.

Complaint.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

Case No. 82-CV-457

JURISDICTION

1. This action for declaratory and injunctive relief arises directly under Article I, Section 8 (interstate commerce), Article IV, Section 2 (Privileges and Immunities of Citizens), and Amendment XIV, Section 1 (privileges or

immunities and equal protection) of the Constitution of the United States and under 42 USC §1983. This complaint is filed and the jurisdiction of this Court is invoked under 28 USC §§1331 and 1343.

PARTIES

2. Plaintiff is a citizen of the United States and the State of New York and a resident of the City and County of Albany, New York in the Northern District of New York.

3. The individual defendants are the Chief Judge and the Associate Judges who now constitute the Court of Appeals of the State of New York under Article VI, Section 2 of the Constitution of the State of New York. Each defendant has an office and the Court conducts its sessions in the City and County of Albany, New York in the Northern District of New York.

SUBJECT MATTER OF CLAIMS

4. In the design of the procedures for admission to practice law in New York, the determination of general and legal educational qualification of applicants has traditionally been kept separate and apart from the co-ordinate determination as to character and general fitness. Responsibility for the former has been retained and is exercised exclusively by the New York Court of Appeals.

5. Determinations of general and legal educational qualifications of applicants for admission to the bar are made by and under the "Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law" which have been adopted by the Court of Appeals pursuant to Section 53 of the New York Judiciary Law and

are published as Part 520, Title 22, Judiciary, in the Official Compilation of Codes, Rules and Regulations of the State of New York.

6. The subject matter of this action is the Rule governing admission of applicants without examination which is section 520.9(a) of said Rules and provides:

> 520.9 Admission without examination. (a) General. In its discretion the Appellate Division may admit to practice without examination an applicant who:
>
> (1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and
>
> (2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:
>
> (a) in its highest law court of highest court of original jurisdiction in the state or territory of the United States in the District of Columbia or in the common law country where admitted; or
>
> (b) In Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(c) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(d) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph; or

(ii) is a graduate of and has received a first degree in law from an approved law school as defined in section 520.3(b) of this Part and, for a period of at least five years immediately preceding the application for admission without examination, has been employed in this State or in any other state or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor or associate professor; and

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such

other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age.

BASES OF CLAIMS

7. In determining combinations or cumulations of service under the five-year requirement of the Rule, the Court of Appeals

(a) precludes legal service for the State of New York from consideration although the same and lesser legal service is accepted if it is performed in and for the State of admission or as an assistant counsel to a corporation in the State of admission,

(b) accepts federal military or civilian service which requires admission to the bar for the appointment thereto or for the performance of the duties thereof regardless of its nature and location while service in and for the State of New York in a position which requires admission to the bar for the appointment thereto and for the performance of its duties is precluded from consideration, and

(c) accepts any teaching service as a full-time associate professor in an approved law school for five years while practice for an agency of the State of New York in a position requiring admission to the bar is precluded from consideration.

CLAIMS

8. In the particulars set forth in the preceding paragraph 7 of this complaint, Section 520.9(a) of the

(a) discriminates against interstate commerce,

(b) denies to citizens of New York privileges and immunities of citizens in other States,

(c) abridges the privileges or immunities of citizens of the United States, and

(d) denies persons within New York the equal protection of the laws.

9. The citizens and persons to whom the preceding paragraph 8 refers as being affected are attorneys employed in and by the State of New York who are admitted to the bar of another State and have "actually practiced" less than five years in such other State.

10. The denials and abridgements alleged in the preceding paragraph 8 are made under color of New York State law and regulations.

PLAINTIFF'S STANDING

11. Plaintiff was born in Baltimore, Maryland on May 11, 1951 and, without interruption, was a resident and citizen of Maryland until January 1980. Since January 1980, plaintiff has been and is now a resident and citizen of New York.

12. Plaintiff graduated from the University of Maryland at College Park in December 1972 and from the University of Maryland School of Law in June 1976.

13. In December 1976, plaintiff was admitted to practice in the State of Maryland after written examination in July 1976. In February 1977, plaintiff was admitted to practice in the State of Florida after written examination in October 1976. The multi-State portion was not required to be taken in Florida where plaintiff was credited with passing such examination as part of the written examination in Maryland. In December 1977, plaintiff was admitted to practice in the State of California after written examination in July 1977.

14. Plaintiff is also admitted to practice in the United States Supreme Court, the District of Columbia Court of Appeals, U.S. Courts of Appeals for the D.C., 3rd, 4th, 5th, 8th and 9th Circuits, U.S. District Court for the District of Maryland, U.S. Court of Claims and U.S. Tax Court.

15. In January 1975, plaintiff was employed as a Clerk by the Office of People's Counsel of Maryland and was promoted to Assistant People's Counsel upon his admission to the bar on December 30, 1976 and continued to serve as such to January 1980.

16. In September 1979, plaintiff was recruited as an attorney by the New York State Consumer Protection Board for the position of Intervenor Attorney in the Board's Utility Intervention Unit. Plaintiff was appointed to such position effective January 14, 1980 and has since practiced and continues to practice public utilities law in such position.

17. As an Intervenor Attorney for the Utility Intervention Unit of the New York State Consumer Protection Board, plaintiff's practice is essentially identical to his

practice as a Maryland Assistant People's Counsel, i.e., appearing on behalf of utility consumers before State and Federal utility regulatory commissions, prosecuting and defending judicial causes relating to utility matters and acting as legislative counsel to the respective State agencies.

18. As an Intervenor Attorney for the Utility Intervention Unit of the New York State Consumer Protection Board, plaintiff has represented consumers before the New York Public Service Commission, Federal Energy Regulatory Commission, Federal Communications Commission, U.S. Court of Appeals for the D.C. Circuit and, upon admission *pro hac vice,* in the New York Supreme Court, Albany County, the Appellate Division, Third Department and the New York Court of Appeals.

19. By letter dated March 23, 1982, the Court of Appeals advised plaintiff of his denial of his application for admission to the bar without examination and noted that "Employment in New York State by the Consumer Protection Board as an Intervenor Attorney is not actual practice in contemplation of Rule 520.9(a) (2) (i) (a)." By letter dated April 20, 1982, the Court of Appeals advised plaintiff of its denial of his petition for reconsideration.

RELIEF DEMANDED

20. Plaintiff prays for judgment

a. declaring unconstitutional Rule 520.9(a) of the New York Court of Appeals in so far as it precludes legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under its five-year service requirement, and

b. enjoining defendants from precluding legal services of attorney-employees of the State of New York in determining combinations or cumulations of service under the five-year rule, and

c. for attorneys' fees, costs and disbursements.

Dated: Albany, New York
May 21, 1982

McGINN AND BROWN, P.C.
By: /s/ ARTHUR F. McGINN, Jr.
Attorney for Plaintiff
41 State Street
Albany, New York 12207
Telephone: (518) 436-7684

Answer.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

82-CV-487
(Judge Miner)

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, answering the complaint herein:

FIRST: Admit the allegations in paragraph 3.

SECOND: Deny the allegations in paragraphs 8, 9 and 10.

THIRD: Deny knowledge or information sufficient to form a belief as to the allegations in paragraphs 2, 11, 12, 13, 14, 15, 16, 17 and 18.

FOURTH: The allegations in paragraphs 1, 4, 5, 6 and 7 set forth conclusions of law which do not require a response. To the extent that the allegations in these paragraphs are factual in nature, they are denied.

FIFTH: Deny the allegations in paragraph 19, and respectfully refer the Court to the letters of March 23, 1982 and April 20, 1982, which are the best evidence of their contents.

AS AND FOR A FIRST DEFENSE:

SIXTH: The plaintiff has failed to seek review of the administrative determination of which he complains by way of an available state judicial remedy under Article 78 of the New York Civil Practice Law and Rules, and this Court therefore lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND DEFENSE:

SEVENTH: The Court should decline to exercise jurisdiction over the subject matter of this action under the doctrine of abstention.

AS AND FOR A THIRD DEFENSE:

EIGHTH: The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendants respectfully request that the complaint herein be dismissed, and that they be awarded such further and different relief as the Court deems just, proper, and equitable.

Dated: June 14, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
By: _____
DAVID B. ROBERTS
Assistant Attorney General

Affidavit of Hon. Hugh R. Jones.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

PHILIP S. SHAPIRO,

Plaintiff,

against

CHIEF JUDGE LAWRENCE H. COOKE and ASSOCIATE JUDGES MATTHEW J. JASEN, DOMENICK L. GABRIELLI, HUGH R. JONES, SOL WACHTLER, JACOB D. FUCHSBERG and BERNARD S. MEYER as the Court of Appeals of the State of New York,

Defendants.

82-CV-487
(Judge Miner)

State of New York,
County of Oneida, ss:

HUGH R. JONES, being duly sworn, deposes and says:

1. I am an Associate Judge of the New York State Court of Appeals, and am named as a defendant in the above-referenced action. I make this affidavit in opposition to the plaintiff's motion for summary judgment, and

in support of the defendants' cross-motion for summary judgment.

2. I have been designated by the Court to act in an administrative capacity in which I carry primary responsibility for the Court's determinations on applications for admission to the New York State bar without examination, pursuant to 22 NYCRR § 520.9(a) (2) (i) (d).

3. The Court has a compelling interest in assuring that attorneys who appear before the bench in this State meet minimum standards of competence. As a general rule this interest is safeguarded by requiring that applicants to the bar pass the bar examination. In addition, certain applicants may be admitted without taking the examination, if they possess experience which would reasonably assure that they meet minimum standards of competence.

4. Section 520.9 sets forth the requirements for admission to the bar without examination, where the applicant has actually practiced law for a period of at least five years, or where the applicant has served for at least five years as a professor or associate professor at an approved law school. A copy of Section 520.9 is annexed hereto and marked as Exhibit "A".

5. Under the procedural format set forth in Section 520.9, the Appellate Division is vested with general responsibility to determine whether an applicant should be admitted to practice without examination. The Court of Appeals becomes involved in this process only when an applicant seeks to satisfy the five-year practice requirement by combining or cumulating terms of service from different categories of practice set forth in Section 520.9 (a) (2) (i) (a)-(c).

6. In passing upon applications pursuant to Section 520.9(a) (2) (i) (d), the Court of Appeals acts in an administrative, not judicial capacity. A determination by the Court under this regulation is not a judicial decision, but an administrative one which is subject to review under Article 78 of the Civil Practice Law and Rules.

7. On March 8, 1982, the plaintiff initially applied to the Court of Appeals for admission pursuant to this section. A copy of his application is annexed hereto and marked as Exhibit "B".

8. By letter dated March 23, 1982, the Clerk for the Court of Appeals notified the plaintiff that his application for a waiver of the bar examination was denied. A copy of this letter is annexed hereto and marked as Exhibit "C".

9. On April 7, 1982 the plaintiff submitted a petition for reargument or reconsideration of the Court's denial of his application. A copy is annexed hereto and marked as Exhibit "D".

10. By letter dated April 20, 1982, the Deputy Clerk informed the plaintiff that the Court had denied his motion for reconsideration. A copy is annexed hereto and marked as Exhibit "E".

11. The materials submitted by the plaintiff in support of his petition indicate that he was admitted to the practice of law in Maryland on December 30, 1976, and served as an Assistant People's Counsel in that State. The petition indicates that from January 14, 1980 to the time of his application, the plaintiff was employed as an intervenor attorney for the New York State Consumer Protection Board. The plaintiff requested that the Court of Appeals

determine that a combination or cumulation of his Maryland employment with that in New York constituted the equivalent of five years of actual practice of law.

12. The Court of Appeals rejected the plaintiff's application on the ground that his two years of employment in New York could not be credited as actual practice of law. If, in fact, the plaintiff "practiced law" in New York during this period, he was engaged in the unauthorized practice of law without a license.

13. With two exceptions, Section 520.9 requires that the applicant possess at least five years of actual experience practicing law in a state, territory, or common law country in which the applicant has been admitted to practice. This general requirement is premised on the reasonable presumption that an attorney may be engaged in "actual practice" only in a jurisdiction in which he or she has been admitted to the bar.

14. The first of the two exceptions to this general requirement is set forth in Section 520.9(a) (2) (i) (b), which recognizes that Federal military or civilian legal service in a position which requires admission to the bar will be "counted" even where the applicant may have been admitted in a State other than that in which his or her Federal Service was rendered.

15. The second exception to the general rule articulated in paragraph 14 is set forth in Section 520.9(a) (2) (ii), which permits an attorney to be admitted to the New York bar without examination if the applicant has been admitted to the bar of another state, and has been employed for at least five years immediately preceding the application as a professor or associate professor at an approved law school.

16. Section 520.9 is not applied by the Court in order to erect protectionist barriers calculated to discourage out-of-state attorneys from applying for admission to the New York bar. The regulation, as applied, promotes interstate commerce by providing an expeditious mechanism for qualified out-of-state attorneys to be admitted to the bar without examination, while preserving the state's compelling interest in maintaining minimum levels of professional competence of members of the bar.

HUGH R. JONES

Sworn to before me this
23rd day of July, 1982.
ROBERT J. SHERIDAN
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires March 30, 1984

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS
CLERK

No. 82-76

IN THE

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

REPLY BRIEF

PHILIP S. SHAPIRO
Petitioner, Pro Se
47 Peyster Street
Albany, NY 12208
(518) 482-4313

Dated: Albany, New York
September 1, 1982

Issues Presented.

I. Under the doctrine of comity, an individual bar admission determination of a State's highest court is reviewable only by writ of certiorari from this Court.

II. A secretive and arbitrary pattern of recognizing or rejecting the legal experience of identically-qualified applicants for bar admission on motion is unconstitutional.

III. The Petition was timely filed.

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SECONDARY MATERIAL:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

No. 82-76

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

REPLY BRIEF.

Statement of the Case.

The Petitioner requested that the Respondents waive their State-of-Admission Practice Rule (see Petition, p. 5) and recognize the Petitioner's legal service in and for the State of New York so that he might qualify for admission

to the New York bar on motion. After the Respondents denied the request, the Petitioner sought reconsideration, which was also denied. The Petitioner thereupon, on July 13, 1982, petitioned this Court to review the Respondents' determination. In a separate proceeding, the Petitioner, as a member of the class of New York State-employed attorneys, has challenged the constitutionality of the State-of-Admission Practice Rule insofar as it precludes the recognition of their New York State service for the purpose of qualifying for admission on motion.

The Respondents' Brief in Opposition asserts that certiorari should not lie because: (1) There are purported State remedies available to the Petitioner; (2) Where applicants are *identically qualified,* the Respondents may arbitrarily grant or deny waiver of the State-of-Admission Practice Rule in secrecy; and (3) The Petition was allegedly filed out of time.

This Reply Brief responds to those claims.

Statement of Facts.

The facts of the case are presented at pages 3-9 of the Petition. The Respondents' Brief in Opposition contains two factual misstatements. First, contrary to the statement at Respondents' Brief, page 5, David A. Schlissel, Esq., an Intervenor Attorney with the State Consumer Protection Board, was not admitted on motion, but was required to retake the New York bar examination. Messrs. Reed and Cowan, of the State Public Service Commission, however, were permitted to be admitted on motion.

Secondly, the Respondents claim, in a footnote on page 13 and also on page 17, that the Petitioner has challenged

their "denial of his admission" in a suit instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the Northern District of New York. This is incorrect. As the prayer to the Complaint (quoted at Respondent's Brief, p. 5) clearly states, the Petitioner's suit only challenges the constitutionality of the State-of-Admission Practice Rule as applied to the class of New York State-employed attorneys, and does not seek a review of the Respondents' refusal to waive the Rule on behalf of the Petitioner.

ARGUMENT.

I.

Under the doctrine of comity, an individual bar admission determination of a State's highest court is reviewable only by writ of certiorari from this Court.

Even when a State's highest court asserts that its refusal to grant an individual's bar admission request is a ministerial act, this Court has deemed such action to be an exercise of judicial power reviewable by this Court. *In re Summers,* 325 U.S. 561, 565-566 (fn. 6) and 568-569 (1945); *Doe v. Pringle,* 550 F.2d 596, 599 (CA 10, 1976), *cert. denied* 431 U.S. 916 (1977); *but cf. Feldman v. Gardner,* 661 F.2d 1295 (CADC, 1981), *cert. granted sub nom., District of Columbia Court of Appeals v. Feldman,* ____ U.S. ____ , 102 S. Ct. 3481, 50 L.W. 3998.09 (June 28, 1982) (No. 1335, 1981 Term).*

*In *Feldman,* this Court will resolve a deep split in the circuits over which Federal court forum has jurisdiction to review state court bar admission denials. It is respectfully submitted that a review of the instant case in tandem with *Feldman* might reduce the volume of such litigation by comprehensively setting forth the Federal rights and remedies attaching to the interstate migration of attorneys.

There is a "subtle but fundamental distinction" between the two types of claims which a bar applicant may bring to Federal courts when he believes a State's highest court has unconstitutionally refused to waive on his behalf a rule which he also believes to be unconstitutional. The *rule* may be challenged by suit under 42 U.S.C. §1983; however, review of the State court's adjudication of his *particular application* for waiver may *only* be had by writ of certiorari from the United States Supreme Court. *Doe v. Pringle,* 550 F.2d at 597.

The Respondents' Brief, at pages 10-11, asserts that the Petitioner could obtain relief from the challenged denial in the State's court system under New York Civil Practice Law and Rules Section 1026 (quoted at Resp. Brief, p. 7); however, as that statute plainly indicates, its application is only to questions arising under New York Judiciary Law, Article 7-A (Sections 210-235), which pertain to various aspects of judicial administration, such as judicial reassignments. Bar admission rules are promulgated under Article 4 of the New York Judiciary Law (here Section 90(1) (b)). Thus, New York Civil Practice Law and Rules Section 1026 offers no remedy to the Petitioner. The case of *Morganthau v. Cooke,* 56 N.Y. 2d 24 (1982), upon which the Respondents rely, solely involved issues arising under New York Judiciary Law Article 7-A and is therefore inapposite.

The Respondents also incorrectly claim that three cases, *Gordon v. Committee on Character and Fitness,* 48 N.Y. 2d 266 (1980), *Matter of Pirie,* 64 A.D. 2d 110, 408 N. Y. S. 2d 511 (1st Dept., 1978), and *Fleming v. Court of Appeals,* 450 U.S. 902 (1981), support their proposition that certiorari does not lie here. Since the *Gordon* and *Pirie* cases did not challenge determinations made by the State's

highest court, certiorari was not available to the bar-applicants involved.* In the *Fleming* case, certiorari was "available," but not granted; hence, *Fleming* has no precedential value.

II.

A secretive and arbitrary pattern of recognizing or rejecting the legal experience of identically-qualified applicants for bar admission on motion is unconstitutional.

In *Schware v. Board of Examiners,* 353 U.S. 232, 239 (1957) and *Konigsberg v. State Bar of California,* 353 U.S. 252, 273 (1957), this Court declared that equal protection and due process safeguards apply to bar admission procedures. (See Petition, pp. 9-10). The Respondents, nevertheless, insist that they may discriminate between *identically qualified* applicants for admission on motion (Resp. Brief, p. 15). They further assert that one bar applicant has no right to know of identical applicants' success or failure in seeking waivers of the State-of-Admission Practice Rule, even where that information is voluntarily disclosed by the other applicants.

For the reasons set forth at Petition pages 9-15, discrimination between two identically-qualified bar applicants is unconstitutional. Additionally, there is no basis for the Respondents' claim to a privilege to keep secret

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*_Pirie,_ however, is useful for illustrating the New York distinction between "legal competence" and "fitness of character." The State-of-Admission Practice Rule, which is the subject of the case at bar, is solely intended to recognize legal competence (Respondents' Brief, Appendix p. A14, ¶3), not fitness of character. In *Pirie,* the applicant's fitness of character was in no way impugned by his preceding practice of law in the State of New York for four years while admitted only in the Commonwealth of Massachusetts. 408 N.Y.S. 2d at 512-513.

evidence of such discrimination which has been voluntarily disclosed by other bar applicants. The authority upon which the Respondents rely for the asserted privilege is New York Judiciary Law, Article 4, Section 90 (10) (quoted at Resp. Brief, pp. 9-10). This statute sets forth the responsibilities of a different court, the State Supreme Court, Appellate Division, for protecting the confidentiality of bar admission and disciplinary records. The statute unambiguously indicates that the confidentiality interest there recognized is in "the persons or attorneys to be affected [by disclosure]" (*Id.*) rather than in the judiciary.

The plain objective of the statute is to restrain arbitrary government power. The suggestion that the statute also confers upon government a shield against judicial or public inquiry into the possible abuse of power is both inconsistent with the tenor of the statute and contrary to public policy.* As the New York Court of Appeals has itself held,

> "[t]he function of publicity, . . ., as an 'effective restraint on possible abuse of judicial power' is, indeed, one of the fundamental safeguards of a free society. [Citations Omitted]" *Matter of New York Post Corporation v. Leibowitz*, 2 N.Y. 2d 677, 682 (1957)

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*See: Francis E. Rourke, Secrecy and Publicity: Dilemmas of Democracy; The John Hopkins Press (Baltimore, Maryland, 1961), pp. 24-25, 100-106.

III.

The Petition was timely filed.

A petition for writ of certiorari should only be filed when no further relief may be granted by a State's highest Court.

As indicated in the Petition, at page 7, the initial waiver request of William Cowan, Esq., was denied. He then requested reconsideration, citing the favorable ruling of the Respondents in the case of the waiver request of Robert Reed, Esq. (*Id.*) Upon *reconsideration,* the Respondents granted Mr. Cowan's request for a waiver of the State-of-Admission Practice Rule.

Since a reconsideration practice both exists and is effective, it is clear that Petitioner's right to petition for certiorari did not ripen until the Respondents, on April 20, 1982, rejected his request for reconsideration.* Indeed, the text of the April 20 notification (Petition, Appendix, p. A-1) does not indicate that the Petitioner's papers were inappropriate. Instead, the letter explicitly states that the underlying reconsideration request had been denied.

Conclusion.

For the reasons set forth in the Petition and herein, the Petition should be granted and the Court should direct the

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*The authority for this reconsideration practice is found in New York Civil Practice Laws and Rules, Sections 101, 2211, and 2217. (Appendix, p. RA-1) In addition, the Respondents' own Rules of Practice explicitly provide for consideration of motions for the reargument of appeals and motions. Rule 500.9(f) (*Id.*). Regardless, there is no barrier to a renewed request for admission to the bar.

Respondents to issue an order certifying that the Petitioner's five years of legal experience satisfies the legal competency qualification for admission to the New York bar on motion.

Respectfully submitted,

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Dated: Albany, New York
September 1, 1982.

APPENDIX.

New York Civil Practice Law and Rules

Section 101. Short title; application

* * *

The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.

* * *

Section 2211. Application for order; when motion made

A motion is an application for an order.

* * *

Rule [Section] 2217. Prior motion; *ex parte* motion; transfer of motion

(a) Prior motion. Any motion may be referred to a judge who decided a prior motion in the action.

(b) Affidavit on *ex parte* motion. An *ex parte* motion shall be accompanied by an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown.

* * *

New York Code of Rules and Regulations, Title 22 [Judiciary], Rule 500 [Rules of Practice of the New York Court of Appeals]

Rule 500.9

* * *

(f) *Reargument of appeals and motions.* (1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

(2) On reargument of motions, a single brief or memorandum may be filed if that was the requirement on the original motion.

(3) The motion may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons. Unless otherwise permitted by the court, the notice of motion shall be served not later than 30 days after the appeal or motion has been decided. Three copies of the brief or memorandum shall be served on the adverse party with the notice of motion.

END OF DOCKET